

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 13

METROPOLITAN CHICAGO, INC.¹

Employer

and

LOCAL 705, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, AFL-CIO

Petitioner

Case 13-RC-20098

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board; hereinafter referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record² in this proceeding, the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.³

3. The labor organization(s) involved claim(s) to represent certain employees of the Employer.⁴

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:⁵

All full-time and regular part-time truck drivers, warehouse workers and helpers engaged in the moving and storage business and leased from MCL Corporation and Unified Management working out of the facility located at 2500 West Roosevelt Road, Chicago, Illinois, excluding all temporary and casual employees referred by Minutemen, carpenters, maintenance employees, technical employees, office clerical employees, dispatchers, secretarial employees, professional employees, guards, and supervisors as defined by the Act.

DIRECTION OF ELECTION*

An election by secret ballot shall be conducted by the undersigned among the employees in the unit(s) found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit(s) who were employed during the payroll period ending

immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by Local 705, International Brotherhood of Teamsters, AFL-CIO.

LIST OF VOTERS

In order to insure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of the full names of voters and their addresses which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *N.L.R.B. v. Wyman-Gordon Company*, 394 U.S. 759 (1969); *North Macon Health Care Facility*, 315 NLRB 359, fn. 17 (1994). Accordingly, it is hereby directed that within 7 days of the date of this Decision 2 copies of an election eligibility list, containing the full names and addresses of all of the eligible voters, shall be filed by the Employer with the undersigned Regional Director who shall make the list available to all parties to the election. In order to be timely filed, such list must be received in **Suite 800, 200 West Adams Street, Chicago, Illinois 60606** on or before November 19, 1999. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the **Executive Secretary, Franklin Court Building, 1099-14th Street, N.W., Washington, D.C. 20570**. This request must be received by the Board in Washington by November 26, 1999.

DATED November 12, 1999 at Chicago, Illinois.

/s/ Elizabeth Kinney
Regional Director, Region 13

*/ The National Labor Relations Board provides the following rule with respect to the posting of election notices:

(a) Employers shall post copies of the Board's official Notice of Election in conspicuous places at least 3 full working days prior to 12:01 a.m. of the day of the election. In elections involving mail ballots, the election shall be deemed to have commenced the day the ballots are deposited by the Regional Director in the mail. In all cases, the notices shall remain posted until the end of the election.

(b) The term "working day" shall mean an entire 24-hour period excluding Saturdays, Sundays, and holidays.

(c) A party shall be estopped from objection to nonposting of notices if it is responsible for the nonposting. An employer shall be conclusively deemed to have received copies of the election notice for posting unless it notifies the Regional Director at least 5 working days prior to the commencement of the election that it has not received copies of the election notice.

1/ The names of the parties appear as amended at the hearing. The hearing was held on April 19 and 20, 1999, and was remanded for further evidence on the issue of who is the employer. The Order Remanding Hearing issued on July 30, 1999, and the remanded hearing was held September 22 and 23, 1999. MCL Corporation ("MCL") and Unified Management ("Unified") were present at the remanded hearing only. Further, Minutemen elected not to be present at the remanded hearing.

2/ The arguments advanced by the parties at the hearing and in the briefs have been carefully considered. Metropolitan Chicago, Inc. ("Metropolitan") filed a Motion to Dismiss the Petition based on its contention that it is not the employer of the petitioned-for employees. The Motion is denied inasmuch as I find that Metropolitan is the employer as discussed in detail below.

3/ Metropolitan is a corporation engaged in the business of moving and storage. During the past calendar year, a representative period, Metropolitan provided services valued in excess of \$50,000 at its Chicago, Illinois, facility to corporations who do business in an amount in excess of \$50,000 in interstate commerce.

4/ The Petitioner seeks to represent a unit of certain employees at Metropolitan's facility. Metropolitan has argued at the hearing and in its brief that the Petitioner is not a labor organization as defined by the Act because it has officers who have engaged in violent criminal activity. I find that the Petitioner is a labor organization as defined by Section 2(5) of the Act. The Board has "long held that a union meets the requirement of Sec. 2(5) of the Act if it exists for the purposes, in whole or in part, of dealing with employers regarding wages, hours, and other terms and conditions of employment, and it is an organization in which employees participate." *Dasal Caring Centers, Inc.*, 280 NLRB 60, 62 fn. 2 (1986). Further, matters such as engaging in violence or threatening illegal conduct, even if present, are not factors in a determination of whether a labor organization meets the requirements of Section 2(5) of the Act. *Id.*

Here, the record shows that employees participate in the Petitioner and that the Petitioner exists for the purpose of dealing with employers concerning the terms and conditions of employment of employees. The Petitioner has around 18,000 employee members and roughly 600 collective bargaining agreements that it has negotiated with employers covering employees' wages and other terms and conditions of employment. The Petitioner also has by-laws, officers elected by the membership, and procedures for processing grievances for its membership. As such, the Petitioner meets the requirements for Section 2(5) of the Act and is a labor organization as defined by the Act.

5/ The parties stipulated that the following unit is appropriate for the purposes of collective bargaining: All full-time and regular part-time truck drivers, warehouse workers and helpers engaged in the moving and storage business working out of a facility at 2500 West Roosevelt Road, Chicago, Illinois, excluding all carpenters, maintenance employees, technical employees, office clerical employees, dispatchers, secretarial employees, professional employees, guards and supervisors as defined by the Act. The parties stipulated to the exclusion of temporary casual employees referred to Metropolitan by Minutemen.

There is no contention that this unit is inappropriate. The Petitioner alleges that Metropolitan in this case employs the unit employees. Metropolitan, however, contends that it does not employ these people, and that an outside business called Unified actually employs the employees in the unit. Metropolitan also maintains that the warehouse supervisor Ted Ciciora and (notwithstanding its stipulation to the unit) the drivers are supervisors within the meaning of Section 2(11) of the Act and should, therefore, be excluded from the unit.

FACTS

Metropolitan provides commercial moving and storage services to various businesses in the Chicago area. At its facility at 2500 West Roosevelt, Metropolitan stores furniture in a warehouse. Helpers, also called movers, load, pack, and unload furniture on trucks and at locations specified by customers. In addition to performing helpers' duties, drivers also drive the trucks used to move the furniture.

Metropolitan leases employees from Unified and MCL¹. MCL was created to provide contractual services to Metropolitan in its warehouse operations. MCL's only business is to lease employees to Metropolitan. MCL leases employees from Unified and then leases those employees to Metropolitan. MCL provides Metropolitan with 2 drivers, 4 warehouse employees and 2 maintenance employees.

Unified is a professional employer organization (PEO) and is engaged in the business of human resources management, administration and staffing of personnel to businesses. Unified's office is located at a different address than Metropolitan. Essentially, Unified provides payroll processing, allows client's employees to become part of its group health insurance rates and provides workers compensation insurance to its clients. Metropolitan submits the workers' hours to Unified and Unified provides the checks with Unified's name on them along with the appropriate deductions. Metropolitan distributes the checks to the workers at its facility. Unified does not determine wage rates, work hours, or work rules.

Unified does not maintain a seniority list of employees leased to its clients. Copies of personnel records are maintained at Metropolitan's facility with originals at Unified's location. Unified has a right to perform safety inspections but has no control regarding whether its recommendations for improvement are implemented. If clients request information about compliance with the law, Unified points out the relevant statutes and advises clients to consult with their own attorney.

Under the lease agreement, which may be terminated by either party with 30 day's notice², Unified provides around 20 full-time workers including management and clericals to Metropolitan. The lease agreement entered in the record, however, does not list any employees whom Unified purportedly leased out and contains no signature from Unified. The agreement lists Metropolitan's president and CEO, Charles Mack, as the guarantor of payments to Unified and as Unified's designated "on-site supervisor" with the authority to hire, discipline and fire employees. Unified's clients appoint the on-site supervisor. Metropolitan signed the original agreement with Unified, which contains similar terms to the current agreement, in 1995.

Charles Mack manages Metropolitan's facility, although the record shows that he is in Florida about 7 months per year. Day-to-day operations are handled by Robert Nichols, Robert Muscari and Donna Velazquez, all of whom are leased through Unified. Mack receives his paycheck of \$500 per week via Unified as do all other employees. Robert Muscari, leased through Unified, works as a dispatcher at Metropolitan's facility and

¹ Metropolitan also obtains temporary and casual employees from Minutemen. The parties stipulated that these employees should be excluded from the unit.

² Unified contends in its brief that the issue of who is the employer is moot because the Metropolitan agreement terminated on March 28, 1999, the date the final payroll issued for Metropolitan. Donna Velazquez, Metropolitan's Controller, initially testified that the agreement terminated in March 1999 when the employees went on strike. Later she stated that the agreement is still in effect, but that there is no payroll being submitted due to the strike. Velazquez further stated that the employees are working for a separate company, Metropolitan Diversified Services ("Diversified") which is engaged in buying and selling used office furniture. Diversified and Unified entered into a leasing agreement (which was not entered into evidence) about April 1999. Robert Nichols is the President and Donna Velazquez is the secretary-treasurer of Diversified.

supervises the truck drivers and helpers. Nichols supervises the employees contracted from MCL, as well as those from Metropolitan. Charles Mack and Robert Nichols interview and hire all new truck drivers and helpers. Unified has not interviewed any of the workers and does not assign employees to its clients. If an employee is too ill to come to work or encounters problems on a job, he contacts Muscari. Nichols and Muscari authorize employees' vacations. Muscari formulates the employees' schedules which they obtain at Metropolitan's facility. Under the agreement, Charles Mack has the authority to, *inter alia*, terminate and discipline employees. He does not consult with Unified before exercising his authority.

Donna Velazquez, the human resources manager and bookkeeper, who stated that she works for Unified at Metropolitan's facility distributed a document which covers terms and conditions of employment to employees. They have never received any work rules or policy manuals issued by Unified. The employees wear t-shirts with Metropolitan's logo on them. The trucks and equipment also bear Metropolitan's logo. If a driver receives a speeding or parking ticket while on a job, the driver submits it to the dispatcher.

Charles Mack is Metropolitan's president, Gwen Mack (Charles Mack's wife) serves as secretary, Robert Nichols is vice-president and Kelly Mack (Charles and Gwen Mack's daughter) is the treasurer. Donna Velazquez is the registered agent. Gwen Mack owns 100% of the shares of Metropolitan. MCL was incorporated in late 1997 and its agreement with Unified is dated January 1, 1998. Robert Nichols is the president and Donna Velazquez is the secretary-treasurer. Neither Nichols nor Velazquez could testify as to the identity of MCL's shareholders or what, if anything, "MCL" stands for. MCL and Metropolitan are located at the same office. MCL does not pay rent to Metropolitan which does pay rent to Charles and Glen Mack who own the property.

The arrangement and agreement³ between MCL and Unified are substantially the same as those between Metropolitan and Unified. Unified does not set wage rates or hours and does not maintain a seniority list of employees leased to MCL. Robert Nichols determines the wage rates and benefits. The benefits for MCL and Metropolitan's employees are the same although, at the time of the hearing, none of the MCL employees had worked long enough to meet the eligibility requirements. The MCL employees do not have uniforms.

Nichols assigns work to the MCL employees and tells them when to report to work and what jobs to go on. If MCL employees need time off, they speak with Nichols. Robert Muscari does not dispatch MCL employees, but Nichols learns of the need for employees from Muscari. Nichols hired all the MCL employees who underwent an application process and did not consult any Unified personnel before doing so. Nichols, who has the authority to discipline and discharge employees on his own authority and without consultation with anyone from Unified, is leased to Metropolitan, not MCL, by Unified.

Ted Ciciora:

Ted Ciciora is the warehouse supervisor at Metropolitan's facility. He has worked at the facility for approximately seven years. His responsibilities include administering accounts including storage, inventory and damage control, unloading of the trucks, and answering phones. He maintains inventory records of account merchandise by tagging an item, logging it on an inventory control sheet and then faxing documentation to the customer.

³ The MCL-Unified Agreement entered into the record is not signed by a Unified representative and does not include a list of employees on Schedule A or designate an on-site supervisor. Robert Nichols stated that he fulfilled the functions of on-site supervisor.

Ciciora earns \$13.50 per hour compared to the estimated \$8-10/hour other employees (helpers) earn and receives the same health benefits. Like other workers at Metropolitan's facility, he wears the shirt with Metropolitan's name on it. He punches in at the same time clock and he doesn't attend management meetings. Ciciora has his own desk, but he uses the same washroom as everyone else. Like other workers, he schedules his vacations by submitting a form to the dispatcher for approval by Mack or Nichols.

Because Ciciora has good contact with customers of Metropolitan, he goes out with drivers and movers to help on furniture deliveries about every other day. While there, whichever employee knows the account best acts as the leadperson for that delivery. The leadperson essentially directs the workers on where furniture should be placed.

While working in the warehouse, Ciciora is the highest-ranking employee. Other employees are scheduled to work with Ciciora everyday. His superiors, Mack or Muscari, tell these employees that they must follow Ciciora's instructions. Ciciora then directs workers in the warehouse by telling them what accounts need servicing (putting away or pulling out furniture). If another worker is engaged in misconduct, Ciciora can, and has in the past, given verbal warnings to that worker. However, Ciciora has never administered any other type of discipline nor has he recommended it to his superiors. Ciciora cannot authorize overtime for himself or for other workers and must obtain authorization from his superiors. If a worker is intentionally hurting another worker or mishandling furniture, Ciciora can recommend to Muscari or Nichols that the worker be sent home. Either his superiors would handle the situation or they would authorize Ciciora to do so. In the absence of Muscari or Nichols, Ciciora has the authority to send workers home in the same situation. Ciciora is not involved in hiring or firing decisions and does not have access to personnel files. He is not involved in employee evaluations, and he cannot recommend pay raises.

Drivers

The drivers operate the trucks used to deliver furniture to different locations and help move the furniture wherever a customer wants it. Drivers have helpers assigned to them. When they arrive at a location, either the driver or helpers talk with a customer to find out where that customer wants the furniture taken or removed. Either the driver or the helpers fill out the necessary paperwork and the customer signs it. Drivers wear the same t-shirt with Metropolitan's name on it. Metropolitan pays the drivers by the hour and they work from 8:00 a.m. to 5:00 p.m. if they have no overtime. The truck drivers must obtain commercial driver's licenses (CDLs) to work at Metropolitan's facility. Copies of these CDLs are held at Unified and Metropolitan's facilities.

ANALYSIS

Employer Status

Metropolitan contends that Unified is the employer for the unit, whereas the Petitioner and Unified argue that Metropolitan is the sole employer. The essential inquiry is which entity has control over the terms and conditions of employment. See, *Lee Hospital*, 300 NLRB 947 (1990) and *The Brookdale Hospital Medical Center*, 313 NLRB 592, 593 (1993) (discussing *Lee Hospital*). For the reasons set forth below, I find that Metropolitan has control over the terms and conditions of employment for the employees in the unit and, as such, is the sole Employer.

The issue in the instant cases essentially revolves around a question of form versus substance. The lease agreements themselves state that Unified is the employer. I find, however, that the practicalities and substance of the relationship between Unified and its clients (here, MCL and Metropolitan) belie that form. Metropolitan relies, in large part, on the agreement⁴ between Unified and itself to show that Unified is the sole Employer. That agreement does state that the individuals specified in Schedule A of the agreement shall be deemed employees of Unified. Schedule A of the agreement entered into the record by Metropolitan, however, is blank. Despite the language of the agreement, Metropolitan contends that the employees are employed by Unified pursuant to the agreement. A contractual disclaimer of employer status, however, is not conclusive as to the actual status under the Act. *J.J. Gumberg Co.*, 189 NLRB 889 (1971).

Moreover, even aside from the apparent deficiencies in the language of the contract, the record shows that Metropolitan, not Unified, exercises actual control over the terms and conditions of employment. First, Metropolitan determines the wage rates, hours and work rules. While the paychecks issued since the most recent contract went into effect have Unified's name on them, Unified is merely processing Metropolitan's payroll based on information supplied by Metropolitan. Witnesses testified that they do receive checks directly from Metropolitan, for example, to correct errors. Further, one witness stated that when Unified came into the picture, he was told by Donna Velazquez, Metropolitan's human resources manager and controller, that Unified was there just to process the payroll.

The record⁵ also establishes that Metropolitan is holding itself out to the public as the Employer. Union exhibit 4 is a document on Metropolitan's letterhead which explains that it employs one of the employees leased by Unified and that the name on the employee's W-2 form is that of the company hired to do the payroll. Additionally, the employees wear shirts with Metropolitan's, not Unified's, name and the trucks and equipment bear Metropolitan's name as well.

Next, Metropolitan pays for the employees' health insurance and, under the contract with Unified, is to pay for the unemployment insurance. Union exhibit 5 is also on Metropolitan's letterhead and signed by Comptroller Donna Velazquez and states that it will provide COBRA coverage. While Unified is accountable for providing workers' compensation, Metropolitan supplies it with the necessary information and is held liable for any fines or retroactive increases incurred by Unified.

In *Employee Management Services*, 324 NLRB 1051 (1997), a PEO was found not to be a joint employer of employees.⁶ In that case, Employee Management Systems (EMS) provided payroll and human resources services to LeSaint Logistics, Inc. (LLI). Like the instant case, EMS also handled workers compensation, paycheck deductions and inspections. Likewise, that agreement provided that EMS would be the

⁴ The current agreement entered into the record in this case does not bear a signature on behalf of Unified.

⁵ The Petitioner introduced several documents at the first hearing which predate the most current agreement between Metropolitan and Unified. As noted above, the relationship between Unified and Metropolitan began in 1995 and has remained substantially the same since then. Nevertheless, for the purposes of this Decision it is unnecessary to rely on the exhibits predating the current contract and, as such, they will not be discussed.

⁶ No party here contends that a joint employer relationship exists. Nonetheless, and though the case arose in an unfair labor practice, not a representation, context, the case is instructive inasmuch as it analyzes the relationship of a PEO and its client in determining who is the employer. Both Petitioner and Metropolitan cite the case in their briefs, albeit with different conclusions. In *Employee Management Services*, no party filed Exceptions to the Administrative Law Judge's findings with respect to the status of the employer.

employer who leased the employees to LLI. The Administrative Law Judge found that EMS played no part in the day-to-day operations of LLI's operations or in the development of the terms and conditions of employment.

The main contrast between that case and the instant case is that, here, the PEO (Unified) ostensibly has a representative at the worksite. I find, however, that that difference is largely illusory. First, the Employer's argument relies on the language of the lease agreement which, as noted above, is not dispositive. Next, the question of the "on-site supervisor" becomes a circular argument. Metropolitan relies on the on-site supervisor as evidence that Unified supervises the employees and is the employer. However, that argument presumes that any leased employee, including an on-site supervisor, is employed by Unified, which is the ultimate issue to be resolved.

Again, I look to the practicalities of the relationship between Unified and its client. The client determines who will serve as the on-site supervisor and the authority exercised by the on-site supervisors is on behalf of the clients. Unified does not benefit and is not harmed by the decisions made by the on-site supervisors. Moreover, no Unified representative (other than the on-site supervisors who are purportedly Unified employees) is involved in Metropolitan's operations. Also, the on-site supervisors have no accountability to anyone at Unified. It appears that the on-site supervisors are included in the leasing process for ease of administration so that Unified can process their payroll as well as for the other employees.

It is also noteworthy that the on-site supervisors are also officers of Metropolitan and MCL. Charles Mack is Metropolitan's president and CEO, but is also designated in the agreement as Unified's on-site supervisor. Robert Nichols is Metropolitan's vice-president and president of MCL. Robert Muscari, who serves as a dispatcher, is purportedly leased to Metropolitan via Unified. Employees refer problems with their paychecks to Mack or Nichols who also distribute the checks. Employees may also speak with Donna Velazquez about this issue. The authority to hire and terminate Metropolitan employees rests with Mack. Employees direct problems on jobs to dispatcher Muscari who also creates the schedules for employees. Mack formulates the work crews. If employees need time off, they seek approval from Nichols or Muscari who also approve overtime. Nichols or Mack approve vacation requests. Thus, other than the input from Muscari, Metropolitan's president and vice-president, provide the majority of supervision and authority for the employees. In sum, I find that the on-site supervisors act as supervisors and agents of the clients rather than of Unified which has no interest, oversight or authority over their decisions.

Based on these facts, I cannot conclude that Unified is the Employer of the employees. It appears from the record that Unified mainly operates as Metropolitan's payroll administrator with some ancillary functions, such as handling workers' compensation. There is no evidence that Unified is involved in directing or controlling the employees' terms and conditions of employment. The substance of the relationship between Unified and Metropolitan contradict and outweigh the language (even ignoring the omissions mentioned above) of the contract between these entities. It is clear that Metropolitan's president and vice-president with the assistance of Muscari, are the driving force in the working lives of the employees in the unit and that Unified is little more than an administrative agent. Accordingly, I find that Metropolitan is the sole employer of the employees in the unit.

The next question to be determined involves the employees leased by Unified to MCL who then leases them to Metropolitan.⁷ The relationship between MCL and Unified is essentially the same as that between

⁷ No written agreement between MCL and Metropolitan was entered into the record. It is unclear whether one exists.

Metropolitan and Unified. As such, as explained above, I cannot find that Unified employs the MCL employees. The MCL employees work with the employees of Metropolitan. Indeed, MCL's sole business is to supply these employees to Metropolitan. The MCL employees work only for Metropolitan and are never referred to other businesses. Metropolitan and MCL operate from the same office and use the same telephone and fax numbers and the same bookkeeper (Velazquez). Robert Nichols, MCL's president and Metropolitan's vice-president who is also involved in supervising Metropolitan's employees, supervises the MCL employees, determines their terms and conditions of employment and has authority to hire and fire them. Nichols is leased by Unified to Metropolitan, not MCL. Therefore, an employee of Metropolitan (as discussed above) determines hiring, discipline, work assignments, wage rates and hours of the employees leased by MCL. Accordingly, I find that the record evidence shows that Metropolitan controls the terms and conditions of the employees leased by MCL to Metropolitan and as such it is the sole employer of them.

Supervisory Issue

Metropolitan claims that Ted Ciciora, the warehouse supervisor, and the truck drivers are supervisors within the meaning of the Act and should be excluded from the unit. The Petitioner, however, claims that these employees are not supervisors and should be included in the unit.

Section 2(11) of the Act defines the term "supervisor" as:

...any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of merely routine or clerical nature, but requires the use of independent judgment.

The exercise of any one of these authorities is sufficient to deem the employee invested with such authority a supervisor. *Queen Mary*, 317 NLRB 1303 (1995). The burden of demonstrating supervisory status is on the party seeking to exclude an individual as a supervisor. *Bennett Industries*, 313 NLRB 1363 (1994); *Masterform Tool Company*, 327 NLRB No. 185 (1999). In each case, the differentiation must be made between the exercise of independent judgment and the routine following of instructions, between effective recommendation and forceful suggestion, and between the appearance of supervision and supervision in fact; *see, e.g.*, *Chevron Shipping Co.*, 317 NLRB 379 (1995); *J.C. Brock Corp.*, 314 NLRB 157 (1994); *Clark Machine Corp.*, 308 NLRB 555 (1992); *McCulloch Environmental Services*, 306 NLRB 565 (1992); and *Quadrex Environmental Co.*, 308 NLRB 101 (1992).

Ted Ciciora

Metropolitan contends that Ciciora, the warehouse supervisor, is a supervisor within the meaning of the Act and, as such, he should be excluded from the unit. The Petitioner claims that Ciciora is not a supervisor and should be included in the unit.

While Ciciora wears the same uniform as other employees and uses the same time clock, he does have a higher wage rate. He earns \$13.50/hour compared with about \$8-10/hour for movers/helpers. Ciciora's position entails receiving furniture and maintaining control over the inventory in Metropolitan's warehouse. Ciciora also goes out on moving jobs and often is the leadman on those jobs. Ciciora testified that he directs employees who are scheduled to work in the warehouse. He stated that he assigns them work based on his

independent judgment. He tells the employees what tasks to perform such as which items to put away or to pull. Muscari and Nichols advise employees who are working in the warehouse that they are to listen to Ciciora. However, it is not clear from the record whether this direction is of a routine nature which does not amount to the exercise of independent judgment.

Ciciora does not recommend or administer formal discipline, but he does report problems to his superiors. He did, however, state that he has issued verbal warnings to employees and does have the independent authority to send employees home. He is not involved in evaluations of employees and does not recommend wage increases.

Based on the record, I am unable to determine whether Ciciora is a supervisor within the meaning of Section 2(11) of the Act. Accordingly, he may vote, subject to challenge, in the election directed herein.

Drivers

Metropolitan stipulated to the inclusion of drivers in the unit. Nevertheless, it simultaneously claims that the drivers are supervisors within the meaning of Section 2(11) of the Act and should be excluded. I find that Metropolitan has not met its burden to demonstrate that the drivers are supervisors within the meaning of the Act.

In addition to performing the duties of helpers/movers, the drivers also drive the trucks. Employee witnesses stated that, in their view, there typically is no supervisor on the moving jobs. There is one person, who generally knows the account best, who handles the paperwork and contact with the client. There is no evidence that the drivers use independent judgment to direct the work of other employees on the job. The one driver who testified at the hearing stated that he earned about \$14/hour compared with about \$8/hour for the helpers. That fact alone is not dispositive. In sum, there is no evidence that the drivers use independent judgment in directing the work of other employees. Accordingly, I find that they are not supervisors and they shall be included in the unit.

There are approximately 18 employees in the unit found appropriate.

177-3901; 177-3925-4000; 177-1650;
177-8501; 737-2850-9200